UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE,

Plaintiff,

Civil No. 2:07cv169

v.

JEROME REED,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

NOW COMES the Plaintiff, JTH Tax, Inc. d/b/a Liberty Tax Service [“Liberty”], by counsel, and for its Memorandum in Support of Motion for Default Judgment against the Defendant, Jerome Reed [“Reed”], states as follows:

I. FACTS

Reed previously owned and operated five Liberty Tax Service franchises which gave to Reed the right to operate Liberty Tax Service offices using Liberty’s proprietary trademarks and methods in specified territories in New Jersey. Pursuant to Franchise Agreements, Reed eventually operated one Liberty Tax Service office in the Territory identified by Liberty as NJ163. This office was located at 6 Market Street, Clifton, New Jersey 07012. *See*, Via Decl. and Pecora Decl., Ex. 1 which is a true and correct copy of the franchise agreement for this territory. The other agreements are identical except for the territory description. Reed also purchased four other Liberty territories in which he never opened offices, pursuant to identical franchise agreements, but for different territories.

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Reed refused to be guided by his Franchise Agreement and the marketing and operational advice of Liberty in order to be successful. For example, Reed failed to maintain office hours during the off season in violation of Section 6.e. of his franchise agreement, failed to apply for an EFIN in time to ensure that he would be able to obtain an EFIN from the IRS by January 8th, 2005 in violation of Section 8(b)(ix) of the franchise agreement, failed to submit a Budget and Profit and Loss statement in violation of Section 7.b. of the his franchise agreement, and failed to submit a Gross Receipts Report in violation of Section 7.a. of his franchise agreement. Reed also failed to have a telephone number and/or answering machine by which customers could reach his office in violation of 6.h. of his franchise agreement, failed to post the correct business hours and location where clients could reach him in the off season, failed to have a computer system necessary to adequately service customers in violation of section 6.i. of the franchise agreement, failed to listen to conference calls which help to ensure a franchisee's successful operation of a Liberty office, failed to utilize Liberty's marketing plan and roadside wavers, although this is Liberty's proven effective marketing technique, abandoned his Liberty office in violation of Section 6.e. of his franchise agreement, and failed to pay monies owed to Liberty in violation of Section 21 of his franchise agreements (Via Decl. and Gundran Decl.).

On or about April 4, 2006, Liberty sent a Notice to Cure to Reed informing him that he was in violation of his Franchise Agreements in that he owed to Liberty monies which were more than 30 days past due. (Via Decl., Ex. 6.) Reed failed to cure this deficiency. (Gundran Decl and Via Decl.) As such, on or about June 27, 2006, Liberty sent a letter to Reed informing him that his franchise agreement was terminated based upon his failure to pay amounts owing to Liberty. (Via Decl., Ex. 7.)

Upon termination of Reed's Franchise Agreement with Liberty, Reed became subject to certain post-termination obligations to Liberty. (Compl., Ex. 1, ¶¶ 9-10.) In addition to the in-term breaches already set forth above, Reed also breached his post-termination obligations by filing a lawsuit against Liberty in New Jersey state court[1] in breach of Section 15 of his franchise agreement, which caused Liberty to incur $17,173.14 in legal fees which Liberty would not have incurred if Reed had honored Section 15.b. of his franchise agreements and sued in Virginia where Liberty uses salaried in-house counsel to defend cases of this nature. (Sager Decl.) Reed also failed to pay to Liberty all amounts owing to Liberty (Gundran Decl.)

Further detailed facts and exhibits are contained in the Complaint and Declarations of Bonnie Via, Jeanne Pecora, David Sager and Jan Gundran which are incorporated herein by reference.

As a result of these breaches, Liberty filed a Complaint in this Court in this matter on or about April 12, 2007. Pursuant to the Return of Service on file with this Court, the Complaint and other papers filed were personally served on Reed on April 21, 2007. (Mot. for Default Judgment, Ex. 1.) Reed's Answer was due on or about May 14, 2007. Reed has failed to answer the Complaint filed against him. Pursuant to Liberty's Complaint, Reed owes liquidated debts to Liberty in the amount of $10,626.80. (Gundran. Decl.) Reed also owes damages for breach of the franchise agreement, forum selection clause in the amount of $17,173.14. (Sager Decl.)

II. ARGUMENT

A. Liberty is Entitled to a Monetary Judgment in the Amount of $27,799.94

Reed owes to Liberty two components of damage. First, at the time of termination and to

[1] Reed filed suit in New Jersey State Court. On or about April 17, 2007, the case was removed to the United States District Court, District of New Jersey. On May 7, 2007, Liberty filed a Motion to Transfer the case to the United States District Court, Eastern District of Virginia pursuant to a forum selection clause in each of Reed's Franchise Agreements. On August 21, 2007, the United States District Court of New Jersey granted Liberty's Motion to Transfer.

this day, Reed owes to Liberty $10,626.80 primarily for royalties and advertising fees. (Gundran Decl.) At no time has Reed paid any portion of the $10,626.80 of delinquent monies owed to Liberty. *Id.* Upon termination of Reed's franchise agreements with Liberty, Reed became subject to certain post-termination obligations to Liberty. (Via Decl., ¶ 8.) One of these post-termination obligations included paying to Liberty all amounts owed. *Id.* Hence, this money is presently due and owing.

Second, also in breach of his Franchise Agreements, Reed filed a lawsuit against Liberty in the United States District Court, District of New Jersey. However, Reed's Franchise Agreements contain a mandatory forum selection clause specifying Virginia as the sole and exclusive forum in which Reed is to bring any claims against Liberty. The forum selection clause contained in each of the Franchise Agreements (the "Forum Selection Clause") provides in relevant part as follows:

> In any suit brought against us … which in any way relates to or arises out of this Agreement, or any of the dealings of the parties hereto, venue shall be proper only in the federal court located nearest our National Office (presently the U.S. District in Norfolk, Virginia)….

(Pecora Decl., Ex. 1, ¶ 15.b)(emphasis added).

Reed's suit in violation of the Franchise Agreements caused Liberty to incur $17,173.14 in legal fees which Liberty would not have incurred if Reed had honored Section 15.b. of his Franchise Agreements and sued in Virginia.

Case law holds that Liberty is entitled to the attorney's fees associated with defending the New Jersey action due to Reed's breach of the forum selection clause. In *JTH Tax, Inc. d/b/a Liberty Tax Service v. Charon*, a similar case, this Court awarded Liberty $9,718.52 in legal fees associated with defending the defendant's Texas suit which was brought by the defendant in violation of the identical forum selection clause at issue in this case. (Case No. 2:05cv69, Judge Smith October 27, 2006, at p. 26.)(Opinion and Order attached hereto.) The Court cited various cases to support the award of damages for breach of a forum selection clause. *Id. See, Omrom Healthcare, Inc. v. Maclaren Exps. LTD.*, 28 F.3d 600, 604 (7th Cir. 1994)(suggesting that plaintiff could have sought damages for breach of a forum selection clause); *Lab. Corp. of Am. V. Upstate Testing Lab., Inc.*, 967 F. Supp. 295, 299 (N.D. Ill. 1997)(holding that plaintiff has a right to enforce the forum selection clauses and recover damages for its breach); *Indosuez Int'l Fin., B.V., v. Nat'l Reserve Bank,* 758 N.Y.S.2d 308, 311 (N.Y. App. Div. 2003)(holding that "damages may be obtained for breach of a forum selection clause"); *Tasteful Treasures, Inc. v. Wiethorn,* No. CH04-1239 (Va. Cir. Ct. June 21, 2004)(awarding attorney's fees for defendant's breach of a contractual forum selection clause).

Moreover, in *Allendale Mutual Ins. Co. v. Excess Ins. Co., Ltd., et. al.,* plaintiff's insurance company filed a Complaint in New York based on various breaches by the defendant reinsurer, a company organized under the laws of the United Kingdom. 992 F. Supp. 278 (S.D. N.Y. 1998). One such breach incurred when the defendant brought a declaratory judgment action in England rather than the United States, which was designated the appropriate forum in a forum selection clause agreed upon by the parties. The court held that the plaintiff should recover the costs associated with defending the English action due to the defendants' breach of the forum selection clause. *Id.* In reaching this holding, the court reasoned that the defendants' filing in England was an "opportunistic attempt to evade the effect of the clause." *Id.* at 285.

Hence, Liberty is entitled not only to the liquidated monies that Reed owes to Liberty in the amount of $10,626.80, but also an additional sum of $17,173.14 incurred by Liberty as a direct result of Reed's breach of the forum selection clause in place between the parties here.

CONCLUSION

The Court should enter judgment on behalf of Liberty for $27,799.94 in granting Liberty's Motion for Default Judgment.

JTH Tax, Inc. d/b/a Liberty Tax Service

By: ________________/s/________________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2007, I electronically filed the foregoing along with the supporting declarations of Jeanne Pecora and David Sager, with the Clerk of Court using the CM/ECF system. I also hereby certify that on this date, I mailed the foregoing document by overnight mail, postage prepaid, to the following non-filing users:

Jerome Reed
44 Cherrywood Drive
Piscataway, New Jersey 08854

________________/s/______________

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